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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUSSELL DROHAN, Defendant and Appellant.	E063485 (Super.Ct.No. SWF1402007) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette C. Cavalier, and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Russell Owen Drohan appeals from the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.18.[1] Drohan contends the trial court erred by relying on evidence outside the record of conviction to find his felony petty theft with a prior conviction (§§ 484, subd. (a), 666, subd. (b)(1)) ineligible for resentencing. He also contends the court erred by placing on him the burden of proof for showing resentencing eligibility. Drohan asserts the prosecution bore the burden of showing the value of the stolen property exceeded $950 because the record of conviction is silent as to value.

We affirm the trial court's order on the ground that a petitioner bears the burden of proof on a Proposition 47 resentencing petition and Drohan failed to meet that burden.

I

FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2014, the People charged Drohan with one count of felony petty theft with a prior conviction. (§§ 484, subd. (a), 666, subd. (b)(1).) The complaint alleged Drohan "did willfully and unlawfully steal and take the personal property of another, to wit: GUITARS, . . . having been previously convicted of FIRST DEGREE BURGLARY." On August 25, 2014, Drohan pled guilty to this count and admitted a prior strike conviction for first degree residential burglary.

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[1] Undesignated statutory references are to the Penal Code.

At Drohan's sentencing hearing on October 17, 2014, the trial court imposed a term of 32 months in state prison. The parties and the court discussed the amount of victim restitution. The court observed that the probation officer had recommended an amount of $5,000. The prosecutor suggested the court leave the amount as "to be determined" because the victim had stated he would not seek restitution and Drohan "question[ed]" the amount. The court followed this suggestion, ordering Drohan to pay restitution "in an amount to be determined by the probation department."

On November 5, 2014, Proposition 47 went into effect, reducing certain nonserious, nonviolent felonies to misdemeanors and providing a procedure for persons who are currently serving a felony sentence for such an offense to apply for resentencing. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089; § 1170.18, subd. (a).) Relevant to Drohan's case, Proposition 47 added section 490.2, which defines petty theft as "obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950)" and requires the offense be punished as a misdemeanor. (§ 490.2, subd. (a).)

On November 26, 2014, Drohan filed a petition for resentencing pursuant to section 1170.18, using Riverside County's mandatory petition for resentencing form. His petition identified his conviction as being for a violation of section 484, but did not address the value of the stolen property. The People opposed the petition, alleging Drohan was not entitled to relief because he "stole 5 guitars, worth more than $950." On

March 19, 2015, the trial court issued an order summarily denying the petition. The court's stated ground for denial was that Drohan stole more than $950: "484(a)—stole 5 guitars, amplifier, DVDs—loss over $950.00."

On March 30, 2015, Drohan filed a motion to reconsider the denial of his resentencing petition. To their opposition, the People attached a police report reflecting that the value of the items Drohan stole was $3,360.

The court held a hearing on the motion on April 17, 2015. The public defender argued that because the record of conviction was silent as to the value of the items Drohan had stolen, the court must assume the value was under $950 because the crime was petty theft. The public defender also argued the court erred by relying on "the People's written assertion . . . in their responsive order that the property taken was, say, five guitars, valued over [$950]." The court responded that it had not based its ruling on the prosecution's statement but rather on "a declaration in support of an arrest warrant." The declaration indicated Drohan had stolen five guitars, amplifiers, and DVDs from a shed and that these items were worth more than $950.[2] The court considered a declaration supporting an arrest warrant reliable evidence because it is given under oath and therefore "tends to be more specific and more carefully done."

[2] The declaration is not in the record on appeal.

The court agreed with the public defender that the police report attached to the People's opposition was not admissible evidence and struck the report from the record. However, the court rejected the public defender's argument that a petty theft must be assumed to involve property valued under $950. The court stated: "I don't agree with the defense's position that just because 484(a) is a charge that normally would include items under $950 that therefore they've met their prima facie burden on it. [¶] Prop 47, 1170.18, specifically speaks to the person is only eligible if the loss is under $950, and it specifically says 'for all theft offenses.' " The court further stated that the petitioner bears " 'the burden to prove the [value of the] loss,' " and noted that the public defender was essentially arguing, " 'We can't prove it.' "

The court denied the motion for reconsideration, but did not state whether it was doing so based on Drohan's failure to show the value of the stolen items was $950 or less or on the evidence in the arrest warrant declaration indicating the value exceeded $950.

II

DISCUSSION

On appeal, Drohan argues the trial court erred by (1) relying on the arrest warrant declaration because it was not within the record of conviction and (2) imposing the burden of proving the value of the stolen property on him. We need not reach Drohan's first argument because a petitioner bears the burden of proving eligibility for Proposition 47 resentencing, and Drohan failed to meet that burden.

Proposition 47 renders petty theft with a prior a misdemeanor (except for certain defendants who are required to register as sex offenders or have certain prior convictions for violent or serious felonies or elder abuse), so long as the value of the property taken does not exceed $950. (§§ 1170.18, 484, subd. (a), 490.2, 666; see also *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1327.) Section 1170.18 provides that a person serving a sentence for a felony conviction may petition for resentencing if he "would have been guilty of a misdemeanor under [Proposition 47] . . . had [it] been in effect at the time of the offense." (§ 1170.18, subd. (a).) In Drohan's case, his petty theft with a prior conviction would have constituted a misdemeanor had it been prosecuted after the passage of Proposition 47 only if the value of the property he stole was $950 or less. It was Drohan's burden to establish this fact.

As this court recently held in *People v. Perkins* (2016) 244 Cal.App.4th 129 (*Perkins*), "[b]ecause defendant is the petitioner seeking relief, and because Proposition

47 does not provide otherwise, 'a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing.' " (*Id.* at p. 136 [citing Evid. Code, § 500, which provides, "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"]; see also *People v. Sherow* (2015) 239 Cal.App.4th 875, 878.) The failure to attach "[any] information whatsoever on the nature and value of the stolen property to aid the superior court in determining whether defendant is eligible for resentencing" constitutes a failure to meet the petitioner's burden of proof and thus is a ground for denying relief. (*Perkins, supra,* at p. 137.)

Drohan did not present evidence to meet this burden. The record of conviction is silent as to the value of the stolen guitars and other items, Drohan's petition contained no information to aid the court in determining whether the value of that property was under $950, and defense counsel offered no evidence related to value at the hearing on Drohan's motion to reconsider. The trial court therefore properly denied the petition.[3]

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[3] We do not address Drohan's challenge to the court's reliance on the arrest warrant declaration to find the stolen property was worth over $950 because the court's finding does not change the fact Drohan submitted no evidence tending to show the value was $950 or less. In other words, even if the court had not found the stolen property was worth over $950, it was nevertheless proper to deny the petition because Drohan failed to carry his burden of demonstrating the property was worth $950 or less. "[W]e review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm." (*People v. Geier* (2007) 41 Cal.4th 555, 582.)

(§ 1170.18, subd. (b) ["the court shall determine whether the [defendant] satisfies the criteria in subdivision (a)"].)

We disagree with Drohan's argument that where, as here, the record of conviction is silent regarding the value of the stolen property, *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*) relieves him of the burden of proof because the conviction must be presumed to be for the least serious offense possible. In *Guerrero*, the California Supreme Court recognized courts have applied a presumption in favor of the least offense punishable where the prosecution sought to enhance a current sentence based on the facts of a prior case. (*Id.* at pp. 354-356.) In such cases, the *prosecution* bears the burden of establishing that enhancements apply. (*People v. Towers* (2007) 149 Cal.App.4th 1066, opn. mod. 150 Cal.App.4th 1273, 1277 ["The prosecution bears the burden of proving beyond a reasonable doubt that a defendant's prior convictions were for either serious or violent felonies"].) As a result, any failure of evidence defeats the prosecution's ability to prove the prior offense was subject to greater punishment, triggering an enhancement. *Guerrero* is inapplicable to Proposition 47 because the *defendant not the prosecution* is seeking relief and therefore bears the burden of demonstrating resentencing eligibility.

We also disagree with Drohan's contention that *People v. Bradford* (2014) 227 Cal.App.4th 1322 (*Bradford*) limits the court's eligibility analysis to the record of conviction and therefore relieves him of the burden of proof. In *Bradford*, the court held that under the Three Strikes Reform Act of 2012, the prosecution was not permitted to go

outside the record of conviction to establish a defendant is ineligible for resentencing on the basis of the nature of his conviction. (*Bradford*, *supra*, at p. 1339.) The *Bradford* court did not relieve the defendant of his burden of presenting evidence to support his petition. On the contrary, the court indicated "the petitioner would be well advised to address eligibility concerns in the initial petition for resentencing." (*Id.* at p. 1341.) Here, Drohan did not raise such concerns and did not offer testimony or other evidence on the value of the stolen property. (*Perkins*, *supra*, 244 Cal.App.4th at p. 137.)

Our affirmance of the trial court's order does not prejudice Drohan's ability to file a new petition containing supporting evidence on the value of the stolen property. When Drohan filed his petition, the issue of which party bears the burden of proof on a Proposition 47 resentencing petition was "unsettled." (See *Perkins*, *supra*, 244 Cal.App.4th at p. 140; see also *People v. Sherow*, *supra*, 239 Cal.App.4th at p. 881 [affirming order denying resentencing petition without prejudice to submission of new petition].) If Drohan files a new petition, he "should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible for relief." (*Perkins*, supra, at p. 140, fn. omitted.)

III

DISPOSITION

We affirm the order denying Drohan's petition for resentencing without prejudice to consideration of a subsequent petition that supplies evidence of his eligibility.

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SLOUGH
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.